Supreme Court, U.S.
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No. :_____

In The
Supreme Court of the United States

SHARON B. POLLARD,
Petitioner,

v.

E.I. DUPONT DE NEMOURS COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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65 pp

QUESTIONS PRESENTED

Whether front pay is an element of compensatory damages under the Civil Rights Act of 1991.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Sharon B. Pollard, an individual citizen of the United States, residing in the Western District of Tennessee. Plaintiff has no corporate affiliations. Sharon B. Pollard was the Plaintiff in the District Court, and the Appellee/Cross Appellant in the Sixth Circuit Court of Appeals.

Respondent

E. I. DuPont de Nemours Company is a corporation, which is publicly traded. Petitioner is unaware of any publicly held company owning ten (10%) percent or more of said corporation's stock. Respondent DuPont was the Defendant in the District Court, and the Appellant/Cross Appellee before the Sixth Circuit Court of Appeals.

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Petitioner respectfully petitions for a Writ of Certiorai to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Sixth Circuit opinion (App. A at 1a) is reported at 213 F.3d 933 (6th Cir. 2000), 200 FED App. 0174P (6th Cir. 2000). The District Court opinion (App. B at 27a) is reported at Pollard vs. E. I. DuPont de Nemours Co., 16 F.Supp. 2d 913 (W.D. Tenn. 1998).

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on May 26, 2000. The Court of Appeals entered an order denying a timely petition for rehearing en banc on August 25, 2000 (App. C at 49a).

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

A. 42 U.S.C. § 2000e, Title VII of the Civil Rights Act of 1964, prohibiting discrimination in employment.

B. 42 U.S.C. § 1981a, Civil Rights Act of 1991.

42 U.S.C. § 2000e-5 (g), Section 706 (g) of the Civil Rights Act of 1964, provides that, as a remedy for unlawful employment discrimination, a court may award injunctive relief, reinstatement, back pay, or "any other equitable relief that the court deems appropriate."

The Civil Rights Act of 1991, codified at 42 U.S.C. § 1981a(a)(1), provides: "In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5 [or § 2000e-16]) against a respondent who engaged in unlawful discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704 or 717 of the act (42 U.S.C. § 2000e-2 or 2000e-3 [or 2000e-16]) and provided that the complaining party cannot recover under § 1977 of the Revised Statutes (42 U.S.C. § 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)] from the respondent."

42 U.S.C. § 1981a(b)(2) provides: "Compensatory damages awarded under this section shall not include back pay, interest on back pay, or any other type of relief authorized under section 706 (g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)]."

STATEMENT OF THE CASE

Sharon Pollard and her husband brought this action against her employer, DuPont, for continuing harassment based on her sex since 1987 under Title VII, and state torts, including outrageous conduct. The district court at bench trial found that Pollard was subjected to co-worker hostile work

environment sexual harassment, that her DuPont supervisors were well aware of the discrimination, and that it resulted in a medical leave of absence from her job for psychological reasons. She later was terminated for refusing to return to the same hostile environment.

The district judge awarded Pollard $107,364.00 in back pay and benefits, and $300,000.00 in compensatory damages. He noted that this amount was not sufficient to make her whole. He further noted that this was a case for punitive damages, but he could not award in excess of the $300,000.00. He further noted that the Sixth Circuit in the case of Hudson v. Reno, 130 F.3d 1193 (6th Cir. 1997), ruled that front pay was subject to the statutory limitation of $300,000.00, and therefore he was not awarding front pay to Pollard; but for said limitation, he would have awarded additional damages.

DuPont appealed the district court decision to the Sixth Circuit. Pollard cross-appealed and argued, in part, that front pay is not subject to the statutory limitations under 42 U.S.C. Section 1981a.

The panel of judges assigned to the case ruled in Pollard's favor on the issues raised by DuPont, and agreed that the record demonstrated that DuPont employees engaged in flagrant discrimination based on gender and that DuPont managers and supervisors did not take adequate steps to stop it.

The Sixth Circuit panel further found that the arguments raised by Pollard as to whether front pay is subject to statutory limitations on compensatory damages were correct, "but our hands are tied." The panel ruled that it

could not overturn the decision of another panel of the court, namely Hudson v. Reno, 130 F.3d 1193 (6th Cir. 1997).

Pollard, therefore, timely petitioned for rehearing en banc, which was denied on August 25, 2000.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

In Hudson v. Reno, 130 F. 3d 1193 (6th Cir. 1997), cert. denied, 119 S. Ct. 64 (1998), a three-judge panel held that front pay is an element of compensatory damages subject to the statutory limitations set out in the Civil Rights Act of 1991, codified at 42 U.S.C. § 1981a (a)(b)(3)(D). Following said decision, Hudson requested en banc review by the Sixth Circuit, which was denied; the Supreme Court then denied certiorari. Hudson was one of the first appellate opinions to decide the front pay issue. Subsequently, all other courts of appeal which have heard the issue have decided that front pay is not subject to the statutory limitations under § 1981a, but instead is equitable relief available pre-1991.

Hudson is the controlling authority on this issue in the Sixth Circuit. The three-judge panel in the Pollard decision declined to over-rule Hudson, stating that such reversal would have to come from an en banc decision. The Sixth Circuit has now denied Sharon Pollard's application for en banc review.

The Eighth Circuit's decision is Kramer v. Logan County School District No. R-1, 157 F. 3d 620, 625-26 (8th Cir. 1998). The Tenth Circuit's decision is Medlock v. Ortho Biotech, Inc., 164 F. 3d 545, 556 (10th Cir. 1999). The District of Columbia Circuit's decision is Martini v. Federal National Mortgage Association, 178 F.3d 1336, 1348-49 (D.C. Cir. 1999). The Ninth Circuit's decision is Gotthardt v. National Railroad Passenger Corp., 191 F. 3d 1148 (9th Cir. 1999). Two district court decisions are reported, which also reach a conclusion contrary to Hudson: Rivera v. Baccarat, Inc., 34 F. Supp. 2d 870, 878 (S.D. N.Y. 1999); Bizelli v. Parker Amchem, 17 F. Supp. 2d 949, 954 n.2 (E.D. Mo. 1998).

There is no logical way to reconcile the split of authority between the Sixth Circuit and the other circuits. This front pay issue is very significant. Persons working within the Sixth Circuit have greatly reduced claims, much different from persons in the rest of the country.

II.

THE DECISION OF THE SIXTH CIRCUIT IS INCORRECT.

A. § 1981a explicitly excludes remedies which were traditionally available under Title VII from the statutory limitations. 42 U.S.C. § 1981a(b)(2)

B. Prior to the 1991 Act, all circuits, including the Sixth Circuit, routinely treated front pay as an available equitable remedy. See Reneau v. Wayne Griffin & Sons, Inc., 945 F.2d 869, 870 (5th Cir. 1991); Wilson v. S&L Acquisition Co., 940 F.2d 1429, 1438 (11th Cir. 1991); Powers v. Grinnell Corp., 915 F.2d 34, 42 (1st Cir. 1990);

Morgan v. Arkansas Gazette, 897 F.2d 945, 954 (8th Cir. 1990); Erebia v. Chrysler Plastic Prods. Corp., 891 F. 2nd 1212, 1214 (6th Cir. 1989); Wulf v. City of Wichita, 883 F.2d 842, 873 (10th Cir. 1989); Bruno v. W.D. Saunders Co., 882 F.2d 760, 772 (3rd Cir. 1989); Graefenhain v. Pabst Brewing Co., 870 F.2d 1198, 1201 (7th Cir. 1989); Cassino v. Reichhold Chem., Inc., 817 F.2d 1338, 1338 (9th Cir. 1987); Shore v. Federal Express, 777 F. 2d 1155, 1159 (6th Cir. 1985).

C. Legislative history of the Civil Rights Act of 1991 clearly indicates that front pay was not intended to be included as compensatory damages subject to the statutory limitations.

Senator Edward Kennedy announced in the Senate that a compromise had been reached on the Civil Rights Act of 1991, stating, ". . . [c]ompensatory damages do not include back pay, interest on back pay, or any other type of relief authorized under § 706 g of the Civil Rights Act of 1964, including front pay." Cong. Rec., § 15234 (Daily Ed. 10/25/91) (emphasis added). Representative Edwards in the House of Representatives stated, ". . . [d]amages awarded under [§ 1981a] cannot include remedies already available under Title VII, including back pay, the interest thereon, front pay, and any other relief authorized under Title VII." 138 Cong. Rec. H. 9527 (Daily Ed. 11/7/91) (emphasis added).

D. The purpose of front pay, as with other remedies, is to make the victim whole. Landgraf v. USI Film Producers, 511 U.S. 244 (1994). In enacting the Civil Rights Act of 1991, Congress intended to provide additional remedies beyond those traditionally available, and wished to impose a cap on the newly available remedies, i.e. compensatory and punitive damages. To apply the reasoning

of Hudson to the instant case, Sharon Pollard was better off under the pre-1991 law, because she could recover her back pay and benefits ($107,364) and front pay[1] and benefits (testimony by economist valued at approximately $800,000), whereas after the 1991 Act she was limited to $107,364 and $300,000. This result was not the intent of Congress.

III.

THE QUESTION PRESENTED IS IMPORTANT.

Congress enacted the Civil Rights Act of 1991 in order:

> "(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace; . . . and
>
> (2) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Act Nov. 21, 1991, P.L. 102-166, § 3, 105 Stat. 1071, Civil Rights Act of 1991 (emphasis added).

Said Act further provides:

---

[1] The district court concluded that reinstatement of Pollard was impracticable in light of evidence presented; that her allegations of emotional difficulties surrounding potential reinstatement were credible; and therefore concluded that but for the cap under § 1981 he would have awarded front pay.

> "The Congress finds that - (1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace. . ." Act Nov. 21, 1991, P.L. 102-166, § 2, 105 Stat. 1071, Civil Rights Act of 1991 (emphasis added).

The Sixth Circuit decision of Hudson, op. cit. is contrary to the Congressional purpose. It thwarts the intent to deter. It defeats the intent to provide additional remedies. It ignores the Sixth Circuit's own precedents, such as Roush v. KFC National Management Co., 10 F. 3d 392, 398 (6th Cir. 1993), cert. denied, 513 U.S. 808 (1994); and Shore v. Federal Express, 777 F.2d 1155, 1159 (6th Cir. 1985).

And, lastly, Hudson stands in the way of the trial court making Sharon Pollard whole. Indeed under the reasoning of Hudson the perpetrator is profiting, not the victim, by the enactment of § 1981a. This result is clearly contrary to Congressional intent, and to Sixth Circuit precedent, including Jackson v. City of Cookeville, 31 F.3d 1354, 1360 (6th Cir. 1994), citing Doyne v. Union Elec. Co., 953 F.2d 447, 451-452 (8th Cir. 1992).

IV.

THE DECISIONS OF THE SIXTH CIRCUIT ADVERSELY IMPACT MEMBERS OF PROTECTED CLASSES, AND ERADICATE THE BENEFITS OF THE CIVIL RIGHTS ACT OF 1991.

In our society the persons least able to protect themselves are persons who are members of protected classes,

such as African-Americans, women, pregnant persons, persons with disabilities, etc. Employers have many resources, and the abilities and resources to retain attorneys and defend actions. The Sixth Circuit decision of Hudson v. Reno impacts the weak and benefits the strong. Hudson eradicates the benefits of §1981a for persons working within the Sixth Circuit. Other circuit courts of appeal have decided the issue of front pay in a manner diametrically opposite to that of this Circuit. The Supreme Court needs to accept certiorari, and to bring the Sixth Circuit into compliance with the Civil Rights Act of 1991, other Circuit Courts of Appeal, and the clearly expressed Congressional intent of the Act in its formulation.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

/s/_____
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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed May 26, 2000]

Nos. 98-6317 / 6319; 99-5125

Sharon B. Pollard,	)
Plaintiff-Appellee/	)
Cross-Appellant,	)
	)
v.	)
	)
E. I. DuPont de Nemours	)
Company,	)
Defendant-Appellant/	)
Cross-Appellee.	)
	)

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 95-03010--Jon Phipps McCalla, District Judge.

Before: MERRITT, CLAY, and CUDAHY*, Circuit Judges.

* The Honorable Richard D. Cudahy, Circuit Judge of the United States Court of Appeals for the Seventh Circuit, sitting by designation.

OPINION

MERRITT, Circuit Judge. Sharon Pollard and her husband brought this action against her employer, DuPont, for "continuing harassment based on her sex since 1987" under Title VII, as well as the common law injuries of intentional infliction of emotional distress, negligent supervision, and loss of consortium. The district court found that she was subjected to co-worker hostile work environment sexual harassment, that her DuPont supervisors were well aware of the discrimination, and that it resulted in a medical leave of absence from her job for psychological assistance and her eventual dismissal for refusing to return to the same hostile environment. We agree with the district court that the record demonstrates that DuPont employees engaged in flagrant discrimination based on gender and that DuPont managers and supervisors did not take adequate steps to stop it.

The claim of sexual harassment was tried before the court instead of a jury. Judge McCalla was so persuaded by Pollard's claim that in his order he concluded that "[t]his is a case of wretched indifference to an employee who was slowly drowning in an environment that was completely unacceptable, while her employer sat by and watched." The court awarded Pollard $107,364 in back pay and benefits, $300,000 in compensatory damages, the maximum permitted by the statutory cap, and attorney's fees in the amount of $252,997.38. DuPont now appeals the court's decisions, arguing 1) that there was no harassment or discrimination based on gender and that the trial court's factual finding that DuPont had actual knowledge of and responded indifferently to Pollard's harassment was clearly erroneous, 2) that the

denial of judgment as a matter of law was improper because Pollard's claim was one of retaliation, not harassment, 3) that Pollard's harassment claim failed because she failed to show disparate treatment, 4) that judicial bias, hostility, and predetermination of facts precluded DuPont's receipt of a fair trial, and 5) that the award of attorney's fees to plaintiff was unreasonable.

Pollard cross-appeals on the bases that 1) front pay should not be subject to limitations on damages under § 198la, 2) the statutory cap on compensatory damages is unconstitutional because it violates the doctrine of separation of powers and the Equal Protection Clause, and 3) the district court erred in granting summary judgment on Pollard's claim of intentional infliction of emotional distress.

I. Facts

The district court's findings of fact are summarized as follows: Pollard began working for DuPont in 1977. In 1978 she was promoted to "assistant operator," and she was transferred to the hydrogen peroxide area of the plant in 1979. Of the approximately 28 employees in peroxide, four were women. Pollard was promoted to operator in 1987, and worked on "C" shift as one of the three operators on that shift until 1992. On each shift, operator #1 is the control room operator, and operators #2 and #3 work in other areas of peroxide manufacture, keeping the pipes, valves and other machinery operating. Each operator's duties are different and none is superior in rank to the others. While Pollard was working on "C" shift, one of the assistant operators named Rory Brico refused to take direction from plaintiff because she was a woman. He placed a Bible on her desk open to the

passage "I do not permit a woman to teach or have authority over man. She must be silent."

After that incident, plaintiff was transferred and became the #3 operator on "A" shift in 1992. The other operators on her shift were Steve Carney, the control room operator, and Jerry Lee, and the assistant operators were named Moody, Walker, and Cobb. The shift supervisor was David Swartz. During 1992 and 1993, the members of "A" shift got along without incident. In February 1994 the atmosphere abruptly changed. DuPont announced that it was going to participate in national Take Your Daughters to Work Day in April 1994, and Pollard was asked to give a talk to a group of girls coming to visit the plant. Some of the men on "A" shift, particularly Steve Carney and Jerry Lee, loudly complained about DuPont's participation in the program. A number of other men in peroxide were also against it, and they circulated an email entitled "Bull Malarky" to everyone in the plant discussing their displeasure with the program.

After plaintiff had discussions with both Steve Carney and Jerry Lee about Take Your Daughters to Work Day in early 1994, all of the men on the shift (with the exception of Mark Cobb, an assistant operator), stopped talking to plaintiff. Cobb's testimony, which was basically undisputed, indicated that Steve Carney, the control room operator, instructed all of the men on "A" shift to not eat with her, share food with her, be in the break room with her, or talk to her, and that Carney instructed the men not to follow any of Pollard's instructions without consulting with him first. Carney admitted in his testimony that "it was a possibility" that he had told the other men to disregard Pollard's directions.

It was common knowledge in the peroxide area that many of the men including Carney, Jerry Lee, and Rory Brico (of the Bible verse incident) did not approve of women working in the peroxide department. Testimony proved that Carney made remarks to this effect approximately five times per week, consistently, and that Carney routinely referred to women as "bitches," "cunts," "heifers," and "split tails." This language was commonly used by several men in peroxide, and Carney admitted that he used the terms to refer to women in general and to plaintiff in particular. In addition, DuPont had a company-sponsor support group called the Women's Network which the men vocally disapproved of Pollard attending. Plaintiff worked in this hostile environment for the next year and half.

In May 1994, after about two months of this treatment, David Swartz, the shift supervisor, held a training meeting. During a break in the meeting, Carney and Walker were having a discussion about a girl's softball team during which Carney said "that heifer can't coach" and "women have no business coaching" in reference to the woman who coached the team. Plaintiff was seated across the table, became upset, and asked to leave the meeting. She went to the nurse's station and asked the nurse to call David Swartz. When Swartz arrived, Pollard told Swartz that she could not take it anymore and that she was tired of the men always saying women couldn't do anything and degrading women. Swartz spoke with his supervisor about the incident, and they decided that Swartz should speak with the men individually about it. With the exception of Walker, none of the men on the shift remembered Swartz speaking with them about it. Carney testified that Swartz did approach him about not communicating with plaintiff immediately after the tension

started in February, but that Swartz gave up on trying to talk to him about it because, according to Carney, "he knows I'm hardheaded . . . [and there] wasn't no sense in saying anything else." In other words, Carney made it plain he was not going to change his behavior.

Swartz testified that he knew there was tension on the shift beginning in the spring of 1994 and that it did not improve for the rest of the year. He specifically testified that plaintiff complained to him about the lack of communication and isolation and other gender-based conduct on several occasions. The situation worsened in the summer of 1994. Plaintiff and Mark Cobb testified that Carney would go so far as to set off false alarms in plaintiffs area, causing her to run around the peroxide area in search of a non-existent problem. Cobb testified that Carney bragged to the other men that this was his way of showing that he, a man, was in control. If a false alarm was set while Pollard was on break cooking her dinner, the men would turn up the stove to burn her food while she was searching for the problem. In addition, Cobb testified that there were numerous incidents during which Carney would not tell plaintiff about actual alarms in her area. Plaintiff would therefore not respond to the problem, and it would appear to the operator on the next shift that she was not doing her job.

Plaintiff's job duties included monitoring the vaporizers in the peroxide tanks and determining when they should be moved. She was to sample the peroxide in a tank one hour after it was moved, and any delay would result in a weak product. Carney admitted instructing the assistant operators on several occasions to remove the vaporizers from the tanks earlier than plaintiff instructed without telling her.

Again, this made it appear to the operator on the next shift that plaintiff was not doing her job, and additionally it affected whether customers would receive their shipments on time. This happened approximately seven times in 1994 and 1995, according to Pollard, with the last incident occurring in July 1995. After the first incident she spoke to the assistant operators about it, and they informed her that they were following Carney's instructions. After the second incident, Pollard spoke with Swartz about the problem. Pollard discussed these ongoing communication problems with Swartz on numerous occasions. Swartz would tell Carney that he must call out the alarms and communicate with plaintiff, but Carney would tell Swartz that he was doing his job, and that Pollard was simply not doing her job. Swartz did not investigate further or discipline Carney. Carney was never suspended or fired for this behavior.

During the summer of 1994 plaintiff found the tires on the bicycle she rode from the gate to her section of the plant had been slashed. That day, Pollard complained to Swartz that she suspected Carney had done it. Swartz spoke with Carney, and he denied having done it. Swartz did not investigate further.

In December 1994, two of the assistant operators, Mark Cobb and David Walker, approached Swartz and asked him to call a meeting to discuss the treatment of Pollard by Carney and the other men. Swartz scheduled a meeting which they called the "first healing meeting." Carney was on vacation the day of the meeting. At the meeting, Walker and Moody told Pollard that Carney told them not to talk to her or communicate with her, and that Carney told them that Pollard was "keeping a book on them." Pollard told them that she

was not doing so, and stressed the importance of communicating with her in order for her to do her job and to avoid possible dangerous consequences. David Swartz was present and heard all of plaintiffs complaints at this meeting.

Carney returned from vacation and was angry that a meeting had been held without him. He demanded a second meeting. During that meeting, plaintiff reiterated her concerns about the lack of communication and other problems. Plaintiff also mentioned her bicycle tire slashing, and told the group of another incident in which she believed Carney tried to run her off the road as she left the plant. Carney "got in plaintiff's face" and said "Nobody in this area likes you, you're here all alone, it's all your own fault." When plaintiff asked Swartz if he was going to allow Carney to talk to her that way, Swartz said "I think that's enough" and ended the meeting. Nothing happened to change the situation.

The tension continued, and plaintiff continued to complain, both to Swartz and in her Women's Network meetings. Pollard told the group she was afraid for her safety and was concerned that a dangerous situation might arise in the peroxide area of which the men would not inform her. Beth Basham, David Swartz's supervisor, attended these meetings. She testified that she heard Pollard's complaints, and recognized that the problem in the peroxide area was due to the male workers not accepting a woman working in that area. In answer to a question on cross-examination, Basham testified that she was "of the firm belief that plaintiff had been harassed on account of her sex in the peroxide area." Basham, however, never investigated Pollard's complaints further.

In the face of this record, and despite the express testimony of management officials Basham and Swartz that they knew of the sexual harassment, counsel for DuPont – both at trial and in their briefs on appeal – maintain that there was no sexual harassment and that no DuPont managers had any knowledge of harassment. At oral argument on appeal, the following testimony from Basham, the general overall supervisor of the peroxide department, was read to Ms. N. Victoria Holladay, counsel for DuPont:

> Q: And you were of the firm belief that she had been harassed on account of her sex in the peroxide area, correct?
>
> A: Yes.
>
> Q: Now, you talked about this situation with Alan Hubbell on several occasions, did you not?
>
> A: Yes.
>
> Q: And Mr. Hubbell's position in 1994-'95 was what?
>
> A: He was the area manager of hydrogen peroxide.

Joint Appendix at 412. In the face of this testimony expressly acknowledging sexual harassment and knowledge, counsel maintained that there was no such harassment and no knowledge by DuPont management.

In May 1995, a specialist in diversity training from DuPont headquarters named Bernie Scales attended the Women's Network meeting. Pollard told Scales of the problems in the peroxide area. Scales spoke to the plant manager about the problem, who subsequently spoke to Bob Shaw, employee relations manager for the plant. Shaw, Lee Ann Rice, and Gary Fish met with plaintiff on May 28, 1995 to discuss her complaints. According to Shaw and Rice, Pollard recounted fully all of her complaints at this meeting. Subsequently, Shaw and Rice spoke to Carney about his behavior. Carney never received a formal written reprimand, was never suspended, transferred, demoted, terminated, or in any other way disciplined for his behavior. There was no further investigation.

Carney's behavior improved for about a month (June 1995); he then returned to his old patterns of behavior in early July 1995. Plaintiff asked David Swartz to transfer her to another shift. Swartz offered to transfer her to the control room operator position on shift "C" with Rory Bricco, the man who had refused to take direction from her when he had been an assistant operator under her some years before, and who had initiated the Bible incident at that time. Plaintiff declined that offer. In late July 1995, Pollard discovered a highlighted copy of that same Bible verse in her locker, stating "A woman should learn in quietness and full submission. I do not permit a woman to teach or have authority over a man, she must be silent." Upon finding the note, plaintiff requested a medical leave of absence from DuPont.

In order to investigate the bible verse incident, DuPont formed a list of identical questions, answerable by a simple

yes or no. When each employee denied having knowledge of the incident, no further questions were asked and the investigation was stopped. Carney himself was never questioned about his knowledge of who had placed the verse in Pollard's locker because he was on vacation at the time it occurred.

After Pollard left "A" shift, the entire shift, including supervisor David Swartz, held a party. They taped balloons to the ceiling and had a fish fry. The purpose of the party was to celebrate Pollard's departure, as Carney admitted in his testimony. Carney said at the party, "Glad the bitch is gone, glad the bitch is not coming back." David Swartz told Carney to shut up, that he did not need to hear Carney saying those things in case of future investigations concerning Pollard.

Plaintiff was on short-term disability leave for six months based in part on the advice of DuPont's psychologist. DuPont scheduled a "return to work" meeting in February of 1996 in spite of the psychologist's advice to the contrary, at which time DuPont told Pollard that they could not guarantee that she would not be put back on a shift with Steve Carney and the other members of "A" shift. When plaintiff declined to return to work under those conditions, DuPont fired her.

II. Hostile Work Environment Sexual Harassment

After reviewing the Supreme Court's decision in *Burlington Industries v. Ellerth,* 524 U.S. 742 (1998), we recently concluded that a plaintiff seeking to establish a company's liability for acts of her co-workers must show that the employer "knew or should have known of the charged

sexual harassment and failed unreasonably to take prompt and appropriate corrective action." *Fenton v. HiSan, Inc.*, 174 F.3d 827, 830 (6th Cir. 1999).

Defendant DuPont challenges the district court's determination that plaintiff was harassed on the basis of her sex because the conduct, according to DuPont, was gender-neutral and non-sexual in nature. In order to prove that forms of conduct not inviting sexual relations constituted sexual harassment, plaintiff "'must show that but for the fact of her sex, she would not have been the object of harassment.'" *Williams v. General Motors Corp.*, 187 F.3d 553, 565 (6th Cir. 1999) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

As the district court found, there was overwhelming testimony as to the anti-female animus which the men in peroxide consistently demonstrated, specifically toward women working in the peroxide area (as opposed to women filling traditionally "female" jobs, such as secretaries and office workers in other areas of the DuPont compound). We have recited these facts in detail above.

Plaintiff must prove that, after considering the totality of the circumstances and the context in which certain treatment of plaintiff occurred, the harassment which she sustained was sufficiently pervasive and severe as to alter the conditions of her employment and create an abusive working environment. Each alleged act of harassment must not be viewed in a vacuum, but must be considered together with the other acts. Characteristics such as their frequency, intensity, and whether they "merely" created psychological trauma or

whether they actually interfered with a plaintiffs work are all factors to be considered.

In the recent *Williams* decision, we determined that the following behavior was severe and pervasive enough to constitute harassment: co-workers who used foul language, such as "fuck" and "slut"; sexual innuendos concerning the plaintiffs breasts or sexual prowess; tasteless sexually-based jokes and puns directed toward plaintiff; co-workers conspiring against her in order to force her onto another shift; objects glued to the top of her desk; being told "I'm sick and tired of these fucking women" and having a box thrown at her simultaneously; being denied overtime and breaks; and other "pranks," such as being locked in a room, or finding materials blocking her way into or out of an area of the plant. *See Williams*, 187 F.3d at 559. This behavior seems clearly to encompass many types of sexual harassment: actual sexual propositioning, offensive language or behavior about women in general and women in the workplace, and non-sexual actions directed toward a plaintiff in order to interfere with her work. Plaintiff here proved daily sexually degrading comments about women which often occurred outside of her hearing; a co-worker who instructed the men working as her assistants not to take direction from plaintiff or talk to her at any time because of her gender; several incidents of plaintiff not being informed of facts concerning her job which would result in an appearance of incompetence on her part, and which could be potentially physically dangerous to her and to other members of the plant; isolated incidents occurring within her hearing of women being called "heifers" and being degraded for their inability to accomplish tasks as well as men; being subjected to false alarms and practical jokes, such as her dinner being burned, with the alleged intent of driving

plaintiff away from her shift; and the Bible verse concerning women's proper submissive role being placed in her locker. This conduct constitutes severe and pervasive harassment, just as severe and pervasive as in *Williams* and our other co-worker sexual harassment precedent.

Next, we address the issue of whether or not DuPont received actual or constructive notice of Pollard's complaints and responded reasonably. DuPont challenges the court's factual findings, arguing that the findings concerning DuPont's lack of responsiveness towards Pollard's numerous complaints were clearly erroneous. Specifically, as pointed out above, DuPont continues to argue that the testimony at trial failed to establish that DuPont was ever made aware that any sex-based derogatory comments were addressed to Pollard. This argument assumes that only sex-based derogatory language is actionable under Title VII, and fails to consider the testimony related to a lack of work-related communication, sabotage of plaintiffs work, and personal isolation and harassment, all of which was based on the belief that women should not work in the peroxide area.

After reviewing the trial testimony in this case, we believe that the trial court's findings of fact were correct. The testimony at trial indicated that plaintiff told her direct supervisor, David Swartz, of the incidents of harassment on numerous occasions. David Swartz, in particular, was independently aware of the language, isolation, and communication problems on "A" shift through his own observations of the shift, even absent plaintiffs complaints to him. In addition, Beth Basham, David Swartz's supervisor, testified that although she believed, based on Pollard's complaints during Women's Network meetings, that Sharon

Pollard was being harassed by her coworkers because they could not accept a woman working in the peroxide area, she never initiated any further investigation concerning the allegations. After the most blatant episode, when Pollard found the Bible verse in her locker, DuPont management interviewed the members of "A" shift with a list of yes-or-no questions, and when they responded "no" to the question concerning knowledge about the event, the interviews were concluded. The lack of an admission under such circumstances is not surprising. No member of the peroxide area was ever formally reprimanded, suspended, or transferred to another shift due to any of their actions. Finally, Bob Shaw confirmed in his testimony that Sharon Pollard was told that if she returned to work, she would be put back on the same shift with Steve Carney and the other members of "A" shift, although a woman would be added to the shift.

This testimony is countered by DuPont's arguments 1) that the men were instructed not to behave inappropriately and to continue to communicate with Pollard as to work-related matters once DuPont became aware of Pollard's work isolation; 2) that DuPont posted notices explaining what constituted inappropriate conduct after learning of the July 1995 Bible verse incident and explained that conduct of that nature would result in termination; 3) that a good-faith investigation, even if ineffective, should shield DuPont from liability; and 4) that her complaints to her direct supervisor, David Swartz, as well as the complaints made in the context of Women's Network meetings, were not actually complaints to management about harassing conduct, and therefore did not put DuPont on actual notice of her problems. These arguments are not persuasive. Not only was it reasonable for

the district court to conclude that members of DuPont management were actually aware of Pollard's harassment complaints, the district court was justified in finding that DuPont's reaction to Pollard's complaints did not constitute a "good faith" effort to remedy the situation. As noted above, this trial produced substantial evidence that several members of DuPont management were aware of Pollard's situation, both through her complaints and through first-hand experience, but they allowed the situation to fester without definitive action on the part of management. Steve Carney's behavior toward Pollard was well known. No disciplinary action was taken against him.

We next address DuPont's argument that Pollard's claim was one of retaliation, not sexual harassment, and thus that the decision holding that sexual harassment existed must be reversed. This is a red herring argument. There is nothing in Pollard's testimony, her complaints to DuPont, or her complaint initiating this action which indicates that DuPont took adverse action against her for complaining of the treatment she was receiving on "A" shift. The complaints indicate quite clearly that Pollard's problem was with her treatment by the other members of her shift and DuPont's inaction with respect to that problem, not any further action which DuPont took against her.

Finally, we turn to DuPont's claim that plaintiff cannot prevail on her claim of hostile work environment sexual harassment because she did not prove disparate treatment. Disparate treatment sexual harassment (assuming that by "disparate treatment" DuPont means harassment subject to the McDonnell Douglas test) is inherently different from hostile work environment sexual harassment. The federal courts treat

the two types of cases differently for good reason. The McDonnell Douglas framework is meant to prove that conduct which might have some otherwise legitimate motive (such as promoting a man instead of a woman) was in fact based upon discriminatory motive. When a plaintiff proves that a hostile work environment existed, there is no legitimate justification for such an environment, and thus recourse to the McDonnell Douglas test is not warranted. A defendant's only option is to deny the charges or argue that defendant effectively remedied the situation, not to submit that the hostile environment was in some way warranted. Additionally, as the Supreme Court recognized in *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 63-68 (1986), the proof of a hostile work environment is in fact part of "'the entire spectrum of disparate treatment of men and women'" in the workplace, which is in no way limited to actions which economically impact a plaintiff, such as decisions to hire, promote, or fire an employee. *Id.* at 64 (quoting *Los Angeles Dept. of Water and Power v. Manhart,* 435 U.S. 702, 707 (1978)). In other words, the Supreme Court has long recognized that proof of hostile work environment sexual harassment is proof of disparate treatment. For these reasons, it is one of the most basic tenets of employment discrimination law that it is not necessary to prove economic disparate treatment in order to make out a prima facie case of coworker hostile environment sexual harassment. The defendant's argument to the contrary is based upon a fundamental misunderstanding of the law.

For the foregoing reasons, we AFFIRM the district court's opinion finding DuPont liable for the co-worker sexual harassment of its employees.

III. Judicial Bias

DuPont also claims that the trial judge was so biased in his approach to this trial that DuPont was denied the fundamental right to a fair trial. During the testimony of Bob Shaw, the final defense witness and the highest-ranking member of DuPont management who testified, Judge McCalla expressed his opinions with regard to this case. He angrily challenged Shaw and questioned him for a period of time, using language that was hostile and evidenced his desire to inform Shaw of the ways in which he believed DuPont had erred in their behavior towards Pollard. The court's comments seem to indicate three things: First, that after hearing all of the testimony (with only the remainder of Shaw's testimony to be heard), the court was quite convinced that the witnesses for the plaintiff were trustworthy and the key witnesses for the defense (the other members of "A" shift, including Steve Carney) were lying. Second, the court had also concluded that DuPont's actions in attempting to remedy the harassment were entirely unsatisfactory. And, finally, the court wanted Bob Shaw to hear his comments on the way DuPont handled this case so that DuPont could learn from its mistakes in this case and proceed differently in the future.

The standard of behavior expected of a judge is different when the case is tried to the bench rather than before a jury. The Supreme Court has recently concluded in language applicable to the conduct in this case:

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been

> shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. As Judge Jerome Frank pithily put it: "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions."

Liteky v. United States, 510 U.S. 540, 550 (1994) (quoting *In re J.P. Linahan, Inc.*, 138 F.2d 650, 654 (2nd Cir. 1943)).

There is no indication in the case at hand that the district court was in any way personally biased for the plaintiff before the trial began, nor is there evidence that DuPont was treated unfairly during the course of the trial. The remarks were made just prior to the conclusion of the defense case, after the district court had heard the vast majority of the evidence before it. In the absence of any evidence that the district court was unfair in his dealings with the defense during the course of the trial, it is difficult for us to conclude that the judge was unfairly biased. In addition, since there was no jury which could have been improperly influenced by the comments, there is no compelling reason to subject this case to a retrial. We believe the court's comments stemmed from the conclusions which the judge had rightly formed as part of his factfinding duty, although the

comments were spoken in anger and moral outrage in response to the injustice and harm DuPont and some of its employees visited upon plaintiff. It is difficult to read the record in this case without sympathy for the plaintiff who endured, without relief, the cruelty of Steve Carney and other male co-workers at DuPont. We therefore DENY defendant's motion for a new trial.

IV. Attorney's Fees

DuPont challenges the district court's decision to award plaintiff attorney's fees. Attorney's fee awards are reviewed for an abuse of discretion. *See Hensley v. Eckerhart,* 461 U.S. 424 (1983). Attorney's fees are generally awarded for a reasonable number of hours expended multiplied by a reasonable fee, and are generally reduced in an amount reflective of the amount of time spent pursuing claims which were ultimately unsuccessful. DuPont argues that the award of attorney's fees ($252,997.38) should have been reduced due to the district court's summary judgment for the defense on the issues of intentional infliction of emotional distress, negligent supervision, and loss of consortium. DuPont also argues that the attorney's fees are excessively high. Plaintiff argues only that the fees were "reasonable." Neither party gives any explanation, either with or without mathematical calculations, as to why the fees were "reasonable" or "unreasonable." Without a more specific claim that the attorney's fees were unreasonable, it is difficult to conclude that the award constituted an abuse of discretion. This was a hard-fought case which has gone on for four years. We are offered no basis for setting aside the fees, and therefore AFFIRM the district court's award of attorney's fees.

V. Statutory Limitation of Front Pay

Pollard cross-appeals on the basis that front pay should not be subject to the limitations on "compensatory damages" under 42 U.S.C. § 1981a. The district court noted that it was bound by this Circuit's decision in *Hudson v. Reno,* 130 F.3d 1193 (6th Cir. 1997), which held that front pay was subject to the $300,000 statutory cap because front pay was an element of future pecuniary losses. Pollard now argues that front pay is not an element of future pecuniary losses, but is instead a replacement for the remedy of reinstatement in situations where reinstatement would be inappropriate. The Equal Employment Opportunity Commission, in an amicus brief, agrees with Pollard that the *Hudson* case was wrongly decided.

First, the argument is made that § 1981a, by its very terms, explicitly excludes remedies which were traditionally available under Title VII from the statutory cap, and notes that front pay was a traditionally available remedy. Second, the argument is made that the legislative history of the statutory cap on compensatory damages clearly indicates that front pay was not intended to be included in it. Third, plaintiff claims that the *Hudson* decision misinterpreted existing Sixth Circuit cases examining the nature of front pay as a remedy. And finally, Pollard and the EEOC argue that public policy concerns weigh in favor of excluding front pay from the $300,000 statutory cap on compensatory damages and that other Circuits have reached a conclusion contrary to *Hudson. See Martini v. Federal Nat'l Mortgage Ass'n,* 178 F.3d 1336, 1348-49 (D.C. Cir. 1999); *Medlock v. Ortho Biotech, Inc.,* 164 F.3d 545, 556 (10th Cir. 1999); *Kramer v. Logan County Sch. Dist. No. R-I,* 157 F.3d 620, 625-26 (8th

Cir. 1998). *See also Rivera v. Baccarat, Inc.*, 34 F. Supp.2d 870, 878 (S.D.N.Y. 1999); *Bizelli v. Parker Amchem*, 17 F. Supp.2d 949, 954 n.2 (E.D. Mo. 1998).

We agree with these arguments, but our hands are tied. One panel of this court may not overturn the decision of another panel of this court - that may only be accomplished through an en banc consideration of the argument. Plaintiff does not purport to distinguish *Hudson*. Therefore, we must decline to overturn the district court's decision that front pay is included in the compensatory damages statutory cap found at 42 U.S.C. § 1981a.

VI. Constitutionality of the Statutory Cap on Damages

Plaintiff cross-appeals on the basis that the statutory cap on compensatory damages found at 42 U.S.C. § 1981a is an unconstitutional violation of the Separation of Powers doctrine. Pollard argues that by creating the statutory cap, Congress impermissibly encroached upon the judiciary and its "traditional responsibility" for assuring against excessive verdicts on a case-by-case basis. We do not find this argument persuasive. Congress created Title VII, and Congress may designate the remedies under Title VII. *See Northern Pipeline Construction v. Marathon Pipe Line Co.*, 458 U.S. 50, 83-84 (1982) (plurality opinion) (holding that where Congress creates a statutory right, "it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies.") The fact that the judicial branch is limited in the amount of damages which it may award does not mean that its ability to decide cases is being impaired by Congress.

Pollard also argues that the statutory damages provision violates the Equal Protection Clause of the Fourteenth Amendment in that it unfairly discriminates among those persons who wish to vindicate their rights with respect to racial discrimination and those who wish to vindicate their rights with respect to gender discrimination. Since the statute at issue is a federal one, we assume that plaintiff meant to invoke the implied equal protection clause inherent in the Due Process Clause of the Fifth Amendment, which is applicable to the federal government. The parties agree that the statute must stand if it bears a rational relationship to any legitimate articulated government purpose.

42 U.S.C. § 1981a places a $300,000 statutory cap on all intentional discrimination on the basis of race, national origin, sex, religion, or disability (as defined in the Americans with Disabilities Act). The statute is inherently equitable on its face. The difference in the application of this statute in situations of gender or race discrimination occurs due to a provision in the Act which states that nothing in section 1981a is to be construed as in any way limiting the remedies provided in section 1981 itself, which does not limit recovery for intentional discrimination based upon race or national origin. However, section 1981 provides relief for a different type of claim than encompassed by the remedies available to plaintiff in section 1981a. Section 1981 provides for relief from discrimination in the making and enforcing of contracts, while section 1981a provides for relief purely from intentional discrimination in the employment context. While section 1981 includes contracts for employment, it also includes contracts for admission to organizations, insurance and other business contracts with private persons or corporations, and admission to schools. Plaintiff cannot

therefore be said to be "similarly situated" with section 1981 claimants.

Even if plaintiff is similarly situated with a section 1981 claimant due to the fact that employment discrimination is covered under both acts, her claim still fails. Discrimination on the basis of race and national origin is indisputably the cornerstone of our entire body of civil rights law. In a political compromise, the Civil Rights Act of 1991 was limited in the remedies which it would provide due to a belief that unlimited damages for all forms of discrimination would force employers to institute hiring quotas for their own economic safety. *See* 137 Cong. Rec. S15472-01 (discussing the fear of quotas that drove the compromise which was reached in the Civil Rights Act of 1991). The adoption of the provision saving the remedies available under section 1981 was rationally related to the legitimate purpose of creating reasonable damages available to all other victims of intentional discrimination without being forced to limit the damages already available to victims of racial and ethnic discrimination.

For the foregoing reasons, we AFFIRM the opinion of the district court limiting plaintiffs award pursuant to 42 U.S.C. § 1981a.

VII. Summary Judgment for the Defense on the Common Law Claims

Finally, plaintiff cross-appeals the district court's decision to grant summary judgment for the defense on plaintiffs claim of intentional infliction of emotional distress. The conduct alleged by a plaintiff must satisfy an extremely

high burden in order to survive a motion for summary judgment with respect to a claim of intentional infliction of emotional distress in Tennessee. The district court in this case correctly quoted the appropriate language from *Dunn v. Moto Photo, Inc.*, 828 S.W.2d 747, 751 (Tenn. Ct. App. 1991), saying that the conduct must be that which would be deemed utterly intolerable in a civilized society. That case makes it clear that criminal, tortious, intentional, or malicious conduct does not automatically satisfy the standard. We believe, however, that the intentional and malicious conduct found by the district court in this case is unusually egregious and raises a factual issue with respect to the outrageousness of the behavior involved. The sort of daily, consistent harassing behavior which Pollard endured over a period of months and years has been characterized as a type of slow torture. Her work was sabotaged, her personal safety was compromised, she was subjected to juvenile pranks intended to force her to resign from the shift, and she was repeatedly informed of her co-workers' belief in the inferiority of women. We found ourselves, after reviewing the record, proclaiming a sense of moral outrage that DuPont managers allowed the conduct of the men in the peroxide area to persist for years in silence, and therefore silent approval. Inaction by an employer, or another actor in a position to exercise control, in the face of continuous, deliberate, degrading treatment of another may rise to the level of intentional infliction of emotional distress. The tort would be unnecessary in our law as a deterrent if assault or physical harm were always made a necessary element.

We conclude that material issues of fact are presented by the outrageous nature of the conduct of DuPont employees together with the refusal of its managers to correct the

situation and its blanket, continuing official denial in the face of contrary facts that discrimination based on gender occurred or that its managers were aware of the discrimination. A fact finder at the trial level will hear the case on remand and decide whether the plaintiff has met the standard enunciated by the Tennessee courts for the tort of intentional infliction of emotional distress. We therefore REVERSE the district court's decision to grant summary judgment to DuPont on this issue and REMAND for trial. Otherwise we AFFIRM the judgment of the district court. Plaintiffs motion to strike Pollard's reply brief is denied.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

[Filed August 20, 1998]

No. 95-3010 M1/V

SHARON B. POLLARD,
Plaintiff,

v.

E.I. DUPONT DE NEMOURS, INC.,
Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff, Sharon Pollard, brought this suit against her former employer, alleging that she had been subjected to a hostile work environment because of her gender, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"). A non-jury trial was held in this matter on October 14, 15, 16, and 24, and November 3 and 4 of 1997. For the reasons set forth below, the Court finds that plaintiff was subjected to a hostile work environment because of her gender, in violation of Title VII, and judgment is ENTERED in favor of plaintiff.

FINDINGS OF FACT

Plaintiff began her employment with defendant in 1977 as a utility worker in the utility pool. She was promoted to the position of assistant operator ("AO") in the oxone flouride area in 1978, and transferred to an AO position in the hydrogen peroxide area in 1979. In 1987, plaintiff was promoted to the position of operator in the hydrogen peroxide area. While plaintiff was working as an operator in peroxide, only one other woman was in an operator position in that area, and only two of the assistant operators were female. All of the other operators and assistant operators in the peroxide area were male.[1]

Plaintiff initially worked as an operator on "C" shift from 1987 to 1992. Each shift has three operators: the control room operator (or operator #1), operator #2, and operator #3. Each operator has separate duties on the shift, and none of the operators is superior in rank to the others. The control room operator works in the control room, the #2 operator works the south side of the area, and the #3 operator works in the laboratory and in the water building. The three AOs that are assigned to each shift take direction from the operators. While plaintiff was working as the control room operator on "C" shift, an incident occurred during which an

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[1] Based on testimony at trial, the Court concludes that there are four different shifts ("A", "B", "C", and "D"), with approximately seven people on each shift. See Testimony of Mark Cobb ("Cobb's Test."), Trial Transcript ("Tr.") at 240. Accordingly, of the approximately twenty-eight employees on shifts in the peroxide area, only four were women.

AO, Rory Bricco, refused to take direction from plaintiff. Mr. Bricco informed plaintiff that he could not take direction from a woman, and placed a Bible on her desk, opened to a passage which read, "I do not permit a woman to teach or have authority over a man. She must be silent."[2] Plaintiff subsequently transferred to a #2 operator position on "A" shift in 1992.

In 1994, plaintiff had moved from the #2 operator position to the #3 operator position on "A" shift in the peroxide area. The other members of her shift were Steve Carney, Jerry Lee, Joey Moody, David Walker, and Mark Cobb. Carney was the control room operator, Lee was the #2 operator, and Cobb, Moody, and Walker were the three AOs on the shift. The shift supervisor at that time was David Swartz.

During 1992 and 1993, plaintiff and all of the other members of "A" shift got along well. Many of the witnesses testified that they viewed the shift as their "extended family." Members of the shift would cook and eat their meals together

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[2] The Court notes that this event occurred outside of the relevant time period in this case, which is from December 1994 to December 1995, and thus cannot form a basis for liability on the part of defendant. Because allegations involving this same Bible verse are properly before the Court, however, this event is included as context, as the Court finds that the fact that plaintiff had been previously exposed to this Bible verse while working in the peroxide area contributed to the intensity of her reaction when she saw it for the second time.

in the break room,[3] and would talk to each other regularly about their lives outside of work.

In February of 1994, however, the congenial atmosphere on "A" shift began to change. At that time, DuPont announced that it would be taking part, for the first time, in the nationally recognized "Take Your Daughters to Work Day" ("TYDTWD") in April of that year. Plaintiff, as one of two female operators in the entire peroxide area, was asked to give a talk about her job to some of the girls coming to visit the plant on that day, and she agreed to do so. A number of the men on "A" shift, particularly Steve Carney and Jerry Lee, were against TYDTWD, and made their displeasure with DuPont's decision to take part in this event widely known. A number of other men in peroxide, and throughout the plant, were against DuPont's participation as well. See Testimony of Jerry Lee ("Lee's Test."), Tr. at 495. One of these men, Paul Lucas, sent an email out to everyone in the plant regarding TYDTWD, referring to the event as "horse malarky."

Plaintiff had discussions with both Steve Carney and Jerry Lee regarding her participation in TYDTWD, and both

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[3] There were three separate eight hour shifts in the peroxide area: the 8:00 a.m. to 4:00 p.m. shift, the 4:00 p.m. to 12:00 midnight shift, and the 12:00 midnight to 8:00 a.m. shift. The employee break room included a small kitchen area with a stove, refrigerator, and microwave, and, particularly on the evening and midnight shifts, members of "A" shift would divide up cooking duties and take turns bringing in food to allow them to eat together.

men made clear that they were against it. Testimony of Sharon Pollard ("Pollard's Test."), Tr. at 627-28. Subsequent to those discussions, the atmosphere on the shift began to change. All of the men on the shift, with the exception of Mark Cobb, stopped eating with plaintiff and stopped talking to her. Cobb testified that Carney instructed the other men on the shift not to eat with plaintiff, not to share food with her, not to be in the break room with her, and not to talk to her. Cobb's Test. at 251, 273. Plaintiff testified as follows:

> [I]f I came into the lunchroom, nobody would sit down at the table with me. If I sat down at a table that someone was already sitting at, they would get up and leave. . . . I heard a lot of under your breath kind of things . . . and snickering.

Pollard's Test., Tr. at 37. Cobb further stated that Carney instructed the other men on "A" shift not to follow any of plaintiff's instructions without checking with him first. Cobb's Test. at 251-52. Carney himself conceded that "[i]t's a possibility" that he told AOs on "A" shift to disregard plaintiff's instructions. Id. at 904.

It was common knowledge among the employees in the peroxide area that Steve Carney, Jerry Lee, Rory Bricco, and many of the other men in the area, did not approve of women working in peroxide. Cobb's Test., Tr. at 246-47, 251, 359, 361; Testimony of David Walker ("Walker's Test."), Tr. at 746-47. Mark Cobb testified that Carney would make comments to this effect approximately five times per week to the men on "A" shift, and Cobb and several other witnesses

confirmed that Carney routinely referred to women as "bitches" and "cunts." Cobb's Test., Tr. at 264, 266; Lee's Test., Tr. at 491-92; Walker's Test., Tr. at 751-52.

Several witnesses testified that they had heard Carney use the word "heifer" to refer to women, and that use of the term "heifer" to refer to women in general was commonplace in the peroxide area. Testimony of Joey Moody ("Moody's Test."), Tr. at 697; Lee's Test., Tr. at 489-90; Walker's Test., Tr. at 723. Carney admitted that he referred to women as "heifers," and that he referred to plaintiff as a "bitch" and a "split tail." Testimony of Steve Carney ("Carney's Test."), Tr. at 908-09. In addition, DuPont had a company-sponsored support group known as the Women's Network,[4] of which Carney routinely expressed his disapproval. Cobb's Test., Tr. at 246-47; see also Testimony of Kay Jenks ("Jenks' Test."), Tr. at 416 (noting that the men on plaintiff's shift did not approve of plaintiff attending the meetings of the Women's Network).

In May of 1994, after plaintiff had been experiencing the kind of isolation described above from the members of "A" shift for approximately two months, the shift supervisor, David Swartz, held a training meeting.[5] During the meeting, all of the members of "A" shift and Swartz were seated around a small conference table. At some point during a

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[4] Plaintiff regularly attended meetings of the Women's Network.

[5] This training meeting was not held to address the problems on the shift, rather it was a training session on work-related matters that was regularly held on Tuesdays.

break in the meeting, Carney and Walker were having a discussion about a girls softball team, during which Carney said "that heifer can't coach," in reference to the woman who coached the team. Moody's Test., Tr. at 697. Carney also said something along the lines of "women have no business coaching." Moody's Test., Tr. at 677-78; Walker's Test., Tr. at 753; Lee's Test., Tr. at 472-73; Pollard's Test., Tr, at 632. Plaintiff, who was sitting across the table from Carney, heard these comments, became very upset, and asked to be excused to go to the nurse's station. Pollard's Test., Tr. at 632-34.

Once she arrived at the nurse's station, plaintiff asked the nurse to call her supervisor, David Swartz, to come and speak with her. When Swartz arrived, plaintiff was very upset and began to cry. Swartz testified that she told him "that she couldn't take it any more, she was tired of people talking about women the way they do . . . [that Steve Carney had said] 'Well, that heifer can't coach,' . . . and she was just tired of them saying that women can't do anything." Testimony of David Swartz ("Swartz's Test."), Tr. at 949-50. Swartz further testified that he understood plaintiff's words to mean that "she couldn't take it any more about [the] men [in peroxide] degrading women." Id. at 979-80.

Swartz testified that he spoke with his supervisor, Alan Hubbell, about this incident, and that they decided that Swartz should speak to the men on the shift individually. Swartz's Test., Tr. at 952. With the exception of Walker, however, none of the men on the shift remembered Swartz speaking to them about this incident. Carney testified that Swartz spoke to him "a few times" about not communicating with plaintiff "right after [they] quit talking," but that Swartz soon gave up

on trying to talk to him about it "because he knows I'm hardheaded . . . [and there] wasn't no sense [sic] in saying anything else." Carney's Test., Tr. at 883-84.

Swartz testified that he could tell "there was tension on the shift" beginning in the spring of 1994, and that things did not improve during the rest of the year. Swartz's Test., Tr. at 954-55. He testified that many of the men talked to him about the tension on the shift, and that plaintiff complained to him about the lack of communication and isolation on several occasions. Id. at 954, 956. When asked by counsel for DuPont what he, as the shift supervisor, tried to do to address the situation between spring of 1994 and December of 1994, Swartz responded:

> Well, I mean we continually talked to each individual. . . . I worked personally talking to each one of them hopefully [sic] that we could get back together, you know, as a more friendly group where it would relieve the tension, but it didn't seem to work.

Id. at 955.

During the spring and summer of 1994, plaintiff's situation worsened. The men on the shift still refused to eat with her or speak with her. She testified, and Mark Cobb corroborated, that on several occasions Carney would set off false alarms in her area, causing her to run around the

peroxide area in search of a non-existent problem.[6] Pollard's Test., Tr. at 38; Cobb's Test., Tr. at 266-69. Cobb testified that Carney would brag to the other men on "A" shift about making plaintiff run all over plant to "show [] that he's in control." Cobb's Test., Tr. at 269. Cobb further testified that on two separate occasions after a false alarm had been pulled while plaintiff was cooking her dinner, one of the men would turn up the stove under her food, burning her dinner and rendering it inedible. Id. at 270-71. Cobb also stated that on several occasions, Carney would not call out actual alarms from plaintiff's area.[7] Id. at 275. As a result, plaintiff would not respond to the problem, and it would appear to the #3 operator on the next shift that she was not doing her job. Id. at 275.

Part of plaintiff's job as the #3 operator was to monitor the vaporizers in the peroxide tanks, determine when they should be moved, and instruct the AOs to move them according to this schedule. Pollard's Test., Tr. at 32-33; Moody's Test., Tr. at 687. Plaintiff testified that, on several occasions, Carney told one of the AOs on "A" shift to remove

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[6] Several witnesses testified that the peroxide area was the size of three city blocks.

[7] Based on the testimony during the trial, it appears that the control room operator sits in the control room of the peroxide area and monitors a series of instrument panels. If there is a problem, the control room operator will become aware of it via these instruments. The control room operator is then supposed to call out an alarm over the intercom system to the operator or AO working in the relevant area, so that the appropriate individual can go check on the problem.

the vaporizer from the tank earlier than plaintiff had planned for it to be removed, and then instructed them not to tell her that they had done so. Pollard's Test., Tr. at 32-33, 35. Plaintiff needed to sample the peroxide one hour after the vaporizer was removed. Id. at 90; Moody's Test. at 710. Accordingly, if the vaporizer was removed early, and plaintiff was not informed that it was removed, the resulting product could be too weak.[8] The fact that the peroxide was not timely sampled also created more work for the #3 operator on the next shift, and made it appear that plaintiff was not doing her job. Id. at 94-95. In addition, removing the vaporizer early could mean that not enough peroxide was made for the shipment out to DuPont's customers the next day, again making it appear as if plaintiff was not competently executing her job duties. Id. 89-90.

Plaintiff testified that the vaporizers were removed early approximately seven times during 1994 and 1995, with the most recent incident occurring during the week of July 5-11, 1995. After the first time that the problems with the vaporizers occurred, plaintiff spoke with David Walker and Joey Moody about it and asked them not to do it again. Id. at 98. Moody told her that he was following Carney's instructions. Id. Carney himself testified that he would sometimes tell one of the AOs to move a vaporizer, and that

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[8] Various percentage strengths of peroxide were made at DuPont. Plaintiff testified that if a tank was off even 2%, e.g., a tank that was supposed to be 70% strength was 68% instead, it could not be brought back up to the proper percentage because the volume of chemicals that would have to be added would not fit into the already full tank. Pollard's Test., Tr. at 102-03.

when he did so he did not believe that he had an obligation to tell plaintiff. Carney's Test., Tr. at 895.

Plaintiff testified that she spoke to her supervisor, David Swartz, about the vaporizer problem the second time it occurred, and every time after that. Swartz admitted that he spoke with plaintiff on several occasions during the spring and summer of 1994, and that she complained to him that "she wasn't getting communication – that Steve wasn't calling out alarms or he wouldn't say stuff to her when [vaporizers] were pulled or whatever because she had responsibility [for] sampling those tanks." Swartz's Test., Tr. at 957. Swartz testified that his only response to these complaints was the following:

> I [Swartz] would go to Steve and say "Steve, that's part of your job, you got to call out alarms." His response was, "I'm calling out the alarms, she's not answering it." So I was hearing it from both sides. And I would tell Sharon, "Steve's saying you're not responding to it." And she would say that she was, and so we had to get that communication link straightened out, and I thought that eventually that worked out. . . .

Id. 957. The evidence in the record, however, demonstrates that the problem was not solved, and that Swartz never investigated plaintiff's complaints further.

During the summer of 1994, plaintiff came to work one day and found that both of the tires on her bicycle had

been slit open.[9] Swartz admitted that the day that plaintiff discovered that the tires had been cut, she reported it to him and told him that she suspected that Carney was responsible. Swartz's Test., Tr. at 959. In response to this complaint, Swartz spoke with Carney, and Carney denied cutting plaintiff's tires. Id. Again, after Carney denied the allegations, Swartz did nothing else to investigate plaintiff's complaints. Swartz stated, "I didn't have any other facts to go on that would say that he did it." Id. 959-60. Accordingly, rather than investigate further, Swartz did nothing.

In December of 1994, after these problems had been occurring for ten months with no improvement, Mark Cobb and David Walker approached David Swartz and asked him to call a meeting with the entire shift to discuss the situation.[10] Accordingly, a meeting was held in late December of 1994 that came to be known as the "first healing meeting." On the date that the meeting was to be held, Carney was on vacation. The members of the shift discussed whether or not they should proceed with the meeting without him, and decided to go ahead.

At this meeting, Walker and Moody told plaintiff that Carney had encouraged them not to talk to her. Pollard's Test., Tr. at 46. Walker and Moody also told plaintiff that

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[9] Because the DuPont plant is so large, employees often ride bicycles from the front gate to their area.

[10] The Court notes that even after all of the complaints that Swartz had received during the past ten months from plaintiff, the idea to call a meeting to discuss the situation was not his.

Carney had told them that she was "keeping a book on them" in which she wrote down everything they said to use it against them. Id. Plaintiff assured them that she was not keeping a book, and then explained to them how stressful the isolation was for her, and how she "had to run around and do more steps than [she] would normally do to get [her] job done . . . because [she] wasn't getting communicated with." Id. at 47. Plaintiff also explained to them that the lack of communication was dangerous because a spill or explosion could result, and that it could also cause a shipment to a customer to be missed. Id. at 51. David Swartz was present throughout this meeting and, again, heard all of plaintiff's complaints.

When Carney returned from vacation and learned that "A" shift had held a meeting without him he was furious, and demanded that another meeting be held. Pollard's Test., Tr. at 51; Cobb's Test., Tr. 285-86; Moody's Test., Tr. at 684; Swartz's Test., Tr. at 961. During the second meeting, the entire shift, including Swartz, was present. Plaintiff reiterated all of her concerns about the lack of communication and other problems. Plaintiff also mentioned that her bike tires had been slashed, and another incident that summer in which she believed that Carney had tried to run her off the road in his truck as she left the DuPont plant.[11] Moody's Test., Tr. at 685; Walker's Test., Tr. at 738. At the second meeting, Carney "got in [plaintiff's] face" and said "Nobody in this area likes you, you're here all alone, it's all your own fault."

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[11] Swartz concedes that he never did anything to investigate plaintiff's allegation that Carney tried to run her off the road. Swartz's Test., Tr. at 1004.

Pollard's Test., Tr. at 52; Moody's Test., Tr. at 684-85; Cobb's Test., Tr. at 289-90. Plaintiff then turned to Swartz, who was observing this interaction, and asked him if he was going to permit Carney to speak to her in that manner. Cobb's Test., Tr. at 290-91; Pollard's Test., Tr. at 52; Swartz's Test., Tr. at 993. Swartz then said "I think that's enough," and the meeting ended with no further resolution of the issues. Id.

Subsequent to these meetings, the situation did not improve. Swartz was aware that the hostility and tension on the shift had not abated, and plaintiff continued to complain to him that the environment was intolerable for her. Swartz's Test. at 964. Swartz, however, took no action to help her. During this time period, plaintiff attended several meetings of the Women's Network and spoke to the group about the problems she was facing, the isolation she was experiencing, and the psychological effect it was having on her. Jenks' Test., Tr. at 415-17. Kay Jenks, a female engineer and one of the leaders of the Woman's Network, testified that during the Network meetings plaintiff:

> was concerned that she would be out there on nights, frequently the only woman on shift, she would go for hours without even hearing another voice. . . . She was concerned that something would happen that would endanger her and they would not tell her, they would not get ahold of her, she was also concerned that maybe something would go wrong in the process that she could help fix or impact, but they wouldn't let her know in time and then it would reflect poorly on her performance.

Id. at 417.

In attendance at some of these meetings was Beth Basham, unit supervisor for the peroxide area.[12] Basham conceded that she heard plaintiff talk about the problems she was having with the men in peroxide on several occasions. Basham's Test., Tr. at 1184, 1194-95. Basham further testified that she "knew there was a real problem in the peroxide area of the male workers accepting the role of a female in that area," and that she "was of the firm belief that plaintiff had been harassed on account of her sex in the peroxide area." Id. at 1195, 1217. In spite of this knowledge, however, Basham never investigated the situation based on what she had learned at the Women's Network meetings.[13] Basham testified that she never wrote a report or sent a memorandum to anyone in upper management at DuPont stating that there was a real problem in the peroxide area regarding the treatment of female employees, and she "could not recall" if she ever discussed the situation with anyone at DuPont's headquarters informally. Id. at 1197-98.

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[12] Basham was the supervisor of Alan Hubbell, who was David Swartz's supervisor. Basham was the "number one person in the peroxide area," and reported directly to the plant manager, Gary Lewis. Testimony of Beth Basham ("Basham's Test."), Tr. at 1181-82.

[13] Basham did become involved in the investigation that took place during the summer of 1995, but, prior to that, did nothing to formally investigate plaintiff's charges of harassment, despite learning of them in the context of the Women's Network meetings.

On May 25, 1995, the Women's Network hosted a meeting at which Bernie Scales, a specialist in diversity training from DuPont's headquarters, spoke to the Network. At that meeting, plaintiff began to talk about the isolation and harassment she was receiving from the men in peroxide, and asked to speak to Scales further at the conclusion of the meeting. After the meeting was over, Scales met with plaintiff. At that meeting plaintiff told Scales all about the long-term harassment and isolation she had been experiencing. As a result of that meeting, Scales spoke to the plant manager Gary Lewis, who then spoke to Bob Shaw, employee relations manager for the Memphis DuPont plant.

On May 28, 1995, Shaw, Lee Ann Rice,[14] and Gary Fish[15] met with plaintiff to discuss her situation. During the course of that meeting, plaintiff recounted the full history of the harassment she had experienced in the peroxide area, including the allegation that Carney had tried to run her off the road the previous summer, and told them that she wanted this situation corrected. Testimony of Bob Shaw ("Shaw's Test."), Tr. at 1094; Testimony of Lee Ann Rice ("Rice's Test."), Tr. at 401; Pollard's Test., Tr. at 62. Subsequent to that meeting, Shaw and Swartz spoke to Carney about his behavior. Swartz's Test., Tr. at 968. Carney never received a formal written reprimand, was never suspended from his job, and was never transferred to another shift, demoted, or terminated. Basham's Test., Tr. at 1223; Carney's Test., Tr. at 903-04. In addition, neither Shaw, nor anyone else at

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[14] Rice is a manager in Human Resources. Her supervisor is Bob Shaw.

[15] Fish was a plant shift supervisor.

Dupont, ever investigated plaintiff's allegation that Carney had tried to run her off the road, after Shaw spoke to Carney and Carney denied that it had occurred. Shaw's Test., Tr. at 1102. Even after Bernie Scales returned to Wilmington with knowledge of plaintiff's concerns, no one from DuPont headquarters ever came to the Memphis plant to investigate plaintiff's allegations. Basham's Test., Tr. at 1250-51.

After Shaw spoke to Carney, Carney's behavior improved for about four weeks. During the week of July 5-11, 1995, however, Carney returned to his prior patterns of behavior. Pollard's Test., Tr. at 107. Another incident in which the vaporizer was taken out early without plaintiff's knowledge also occurred during this week. Id. at 89. Plaintiff went to David Swartz and begged him to "just get me off this shift, nothing's changed and I can't take it." Id. at 107. Rather than investigating the situation or moving Carney to another shift, Swartz spoke to plaintiff the next day and informed her that a control room operator position on another shift was available. Id. at 108; Swartz's Test., Tr. at 994-96. Plaintiff did not want to take this position because it was on the same shift with Rory Bricco, the man who had refused to take direction from her when she was a control room operator on "C" shift. Plaintiff told Swartz she would not bid for that position. Pollard's Test., Tr. at 108-09.

On July 28, 1995, plaintiff discovered a highlighted copy of the same Bible verse that Bricco had put on her desk when he refused to take direction from her in her mailbox at work. As noted above, that Bible verse read: "A woman should learn in quietness and full submission. I do not permit a woman to teach or have authority over a man, she must be silent." Tr. at 407 (quoting 1 Timothy 2:11). When plaintiff

discovered the Bible verse, she described her reaction as follows:

> I felt like I had been hit with a brick, I just couldn't believe that after all that had been talked about, they were asking me to go back into the control room . . . and I just considered [that] this was the men's answer to that.

Pollard's Test., Tr. at 110.

Subsequent to that event, plaintiff never returned to work at DuPont. A committee was formed to investigate the Bible verse incident. As with the other "investigations" that DuPont had initiated with regard to plaintiff's complaints, this one was wretchedly inadequate. The investigation consisted of asking an identical series of typed questions to each of the men on "A" shift individually, and to the other men in the peroxide area in groups. Shaw's Test., Tr. at 1106. All of the questions were answerable with a simple yes or no, and when all of the men denied having any knowledge of the incident, DuPont proceeded no further with the investigation. Shaw's Test., Tr. at 1268, 1270. No one from DuPont management ever questioned Steve Carney about whether he was involved in the Bible verse incident. Carney's Test., Tr. at 931.

After plaintiff left "A" shift, a party was held to celebrate her departure. Cobb's Test., Tr. at 277-79; Carney's Test., Tr. at 931-32. Steve Carney fried catfish and crappie that he had brought in, and the other men blew up balloons and taped them to the ceiling. Id. Mark Cobb testified that at the party Carney declared, "glad the bitch is

gone, glad the bitch is not coming back." Cobb's Test., Tr. at 278. Carney himself testified as follows:

> Q: Now, after she [plaintiff] left, there was a party in the peroxide are, wasn't there?
> A: Yes, ma'am.
> Q: And you participated in that party, correct?
> A: Yes, ma'am.
> Q: And there were balloons at that party, correct?
> A: Yes, ma'am.
> Q: And I believe there was crappie cooked, correct?
> A: Yes, ma'am.
> Q: And you do recall that, don't you?
> A: Yes, ma'am.
> Q: You were celebrating the departure of Sharon Pollard, weren't you?
> A: Yes, ma'am.

Carney's Test., Tr. at 931-32.

Plaintiff was on short-term disability leave for the next six months, during which time she saw a number of psychologists and psychiatrists that DuPont required her to visit. In particular, DuPont sent plaintiff to Dr. Fred Steinberg, who concluded she could not return to work. In spite of this opinion, however, DuPont scheduled a "return to work" meeting with plaintiff in February of 1996. At that meeting DuPont management would not guarantee that plaintiff would not be put back on a shift with Carney. Pollard's Test., Tr. at 219. Plaintiff told them that she could not return to work under those conditions, and DuPont

terminated her, effective February 29, 1996. Id. at 154, 217-19.

CONCLUSIONS OF LAW

Title VII prohibits discrimination "against any individual with respect to [her] compensation, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1) . In Meritor Savings Bank v. Vinson, 477 U.S. 57, 66 (1986), the Supreme Court held that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex created a hostile or abusive work environment. As noted by the Sixth Circuit in Black v. Zaring Homes, Inc., 104 F.3d 822, 825 (6th Cir. 1997), the statute grants employees "the right to be work in an environment free from discriminatory intimidation, ridicule, and insult." 104 F.3d at 825 (quoting Meritor, 477 U.S. at 65).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

[Filed August 20, 1998]

No.95-3010 M1/V

SHARON B. POLLARD,
Plaintiff,

v.

E.I. DUPONT DE NEMOURS, INC.,
Defendant.

JUDGMENT IN A CIVIL CASE

DECISION BY COURT. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that, in accordance with the Memorandum Opinion and Order, filed August 20, 1998, judgment is ENTERED in favor of plaintiff as follows:

a. Defendant is ORDERED to pay plaintiff $107,364.00 in back pay and accrued benefits;

b. Defendant is ORDERED to pay plaintiff $300,000.00 in compensatory damages, in

accordance with the statutory cap set forth in 42 U.S.C. § 198la(b) (3); and

c. Defendant is ORDERED to pay plaintiff's attorney fees and costs. Plaintiff shall submit a statement of fees and costs related to this matter to the Court by September 15, 1998. Defendant may file a response to plaintiff's submittal by September 30, 1998. The Court will then determine the appropriate amount of attorneys fees and costs to be awarded, and will so advise the parties.

This document entered on docket sheet in compliance with Rule 58 and/or 79 (a) FRCP on 8/20/98.

APPROVED:

/s/_____
JON PHIPPS MCCALLA
UNITED STATES DISTRICT COURT

August 20, 1998
Date

/s/_____
ROBERT R. DI TROLIO
Clerk of Court

_____
(By) Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed August 25, 2000]

Nos. 98-6317 / 6319; 99-5125

SHARON B. POLLARD, *Plaintiff-Appellee/ Cross-Appellant,*	)
v.	)
E. I. DUPONT DE NEMOURS COMPANY, *Defendant-Appellant/ Cross-Appellee.*	)

ORDER

BEFORE: MERRITT, CLAY, and CUDAHY,* Circuit Judges.

* Hon. Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit Court of Appeals, sitting by designation.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion of appellee/cross-appellant, and no judge of this court having requested a vote on the suggestion of appellant/cross-appellee, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk